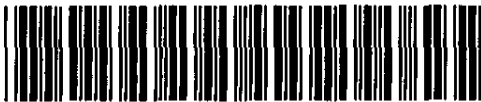


USDC SCAN INDEX SHEET



SLD 1/21/99 13:50
3:96-CV-01023 BRADLEY V. HOFFENBERG
262
RESP.

1 Richard K. Rufner, Esq.
2 7887 East Belleview Avenue, Suite 1275
3 Englewood, Colorado 80111
4 303/796-9500

FILED
99 JAN 20 AM 10:55

Attorney for Defendants Morrison and JINCO Leasing Corporation

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
S. Denso
DEPUTY

7 UNITED STATES DISTRICT COURT
8 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

9
10 PAUL F. CLARK, SR., *et al.*,

11 Plaintiffs,

12 v.

13 ANDOVER SECURITIES, INC., *et al.*

14 Defendants.

) Case No. 96-1023-JM (JFS)

) DEFENDANTS WAYNE MORRISON
) AND JINCO LEASING CORPORATION'S
) RESPONSE IN OPPOSITION TO
) REQUEST FOR ENTRY OF DEFAULT

15 The Defendants Wayne Morrison and JINCO Leasing Corporation by and through
16 their attorney Richard K. Rufner, of The Law Offices of Richard K. Rufner, hereby make
17 this special appearance for purposes of opposing the Plaintiffs' Request for Entry of
18 Default as follows:

19 1. Defendant Wayne Morrison is a resident and citizen of the State of Colorado.
20 Defendant JINCO Leasing Corporation (hereinafter referred to "Jinco"), is a Colorado
21 corporation which, at all times material hereto, had and maintained its principal place of
22 business in the State of Colorado.

23 2. The class action Plaintiff Steven H. Johnson, who is the only Plaintiff who has
24 specific claims against these Defendants herein, was at all times material hereto a resident
25 and citizen of the State of Colorado.

26 3. All actions complained of by Plaintiff Steven H. Johnson occurred in the State
27 of Colorado and had no connection whatsoever with the State of California.

28 4. On January 2, 1999, the Plaintiffs' Request for Entry of Default and
accompanying Declarations of Service were received by these Defendants from Plaintiffs'

262

1 counsel.

2 5. The purported basis of service upon these Defendants was a mailing of the
3 summons and complaint by certified mail. Initially, Plaintiffs mailed the pleadings to these
4 Defendants in 1997. At that time, the undersigned counsel wrote to Plaintiff's attorney
5 stating that Defendants would not respond voluntarily to the action and further stating that
6 Defendants did not believe there would be any basis for personal jurisdiction over them in
7 the State of California (see Exhibit "A" attached hereto and incorporated herein by
8 reference). Defendants also stated their belief that the statute of limitations had expired.
9 These Defendants received no response to that letter.

10 6. On March 16, 1998, these Defendants again received copies of the Summons
11 and Complaint by mail from Plaintiffs' counsel. Believing that such service by mail was not
12 sufficient to establish jurisdiction, undersigned counsel again wrote to Plaintiffs' counsel
13 indicating his understanding that such mailing did not constitute proper and sufficient
14 service of process and asking Plaintiffs' counsel to send to him a copy of the return of
15 service and verification of the manner and method by which jurisdiction is being asserted.
16 Undersigned counsel again also asked what facts and information Plaintiffs would be
17 relying upon in order to support personal jurisdiction over these Defendants in California
18 (see Exhibit "B" attached hereto and incorporated herein by reference). Again,
19 undersigned counsel received no response from Plaintiffs' counsel to this letter. Thus,
20 these Defendants believed that no effective service had been perfected upon them and
21 were unaware that any action was being pursued against them until receipt of Plaintiffs'
22 Request for Entry of Default on January 2, 1999.

23 7. Although these Defendants concede that the state law of California apparently
24 permits service of process by certified mail (Plaintiffs set forth a rule in their Request for
25 Entry of Default), given that Plaintiffs never responded to counsel's letters as referred to
26 above, and given that counsel and the Defendants wholly believed that mailing of the
27 Summons and Complaint was insufficient to establish jurisdiction. At the very least,
28 excusable neglect has occurred which should preclude this Court from entering default

1 against these Defendants.

2 8. Additionally, F.R.C.P. 4(k) states that service of a summons is effective to
3 establish jurisdiction over the person of a Defendant who could be subjected to the
4 jurisdiction of a court of general jurisdiction in the state in which the District Court is
5 located. Given the fact that the complained of actions between Plaintiff Steven H. Johnson
6 and these Defendants occurred in the State of Colorado, and that there are insufficient
7 minimum contacts between either of these Defendants with the State of California, no
8 California Court could establish jurisdiction over these Defendants. Thus, the service of
9 process is ineffective. Jurisdiction of a non-resident Defendant must conform with the state
10 long arm statute and with the constitutional requirements of due process. In the 9th Circuit,
11 a three-part test is employed to determine whether jurisdiction may be applied to a
12 particular Defendant:

13 “(1) that the non-resident Defendant must do some act or
14 consummate some transaction with the forum or perform some act by which
15 he purposefully avails himself of the privilege of conducting activities in the
16 forum, thereby invoking the benefits and protections of its law; (2) the claim
must be one which arises out of or results from the Defendant’s forum
related activities; and (3) exercise of jurisdiction must be reasonable”,
Omeluk v. Langsten Slip & Batbyggeri, 52 F.3rd 267 (9th Cir. 1995).

17 If **any** of the three requirements is not satisfied, jurisdiction in the forum would deprive the
18 Defendant of due process of law. See also Chan v. Society Expeditions, Inc., 39 F.3rd
19 1398 (9th Cir. 1994). All three parts of the test to determine whether jurisdiction may lie in
20 California would fail in this case, thus giving these Defendants an adequate and sufficient
21 ground for dismissing the action against them as filed.

22 9. Additionally, the acts complained of, all of which took place in the State of
23 Colorado, occurred in June, 1992. The statute of limitations for a civil action, regardless
24 of the theory upon which suit is brought, or against whom suit is brought, shall be
25 commenced within two years after the cause of action occurs, including a tort. Plaintiffs’
26 claims based upon violations of Federal Securities Laws, likewise, would fail for violation
27 of the statute of limitations. Section 13 of the Securities Act sets forth the statute of
28 limitations for actions commenced under Sections 11 and 12 of that Act for the sale of

1 unregistered securities, which limitation is one year. The appropriate limitations period for
2 civil actions based on implied causes of actions under Section 10(b) of the Exchange Act
3 also is controlled by the one year statute of limitations. Lampf, Pleva, Lipkind, Prupis &
4 Petigrow v. Gilbertson, 501 US 350 (1991); Section 27(a) of the Securities Exchange Act.
5 Thus, none of Plaintiffs' claims against these Defendants can possibly survive a defense
6 of failure to satisfy the applicable statutes of limitations.

7 10. For the reasons as set forth herein, default should not enter against these
8 Defendants. Alternatively, if default has been entered, it should appropriately be set aside
9 for good cause shown pursuant to F.R.C.P. 55(c).

10 WHEREFORE, these Defendants pray that this Court deny the Plaintiffs' Request
11 for Entry of Default as such request pertains to them, and that this Court grant such other
12 and further relief as it may deem appropriate.

13 Dated this 19 day of January, 1999.

14 Respectfully submitted.

15 THE LAW OFFICES OF RICHARD K. RUFNER

16 

17 Richard K. Rufner (Colorado Reg. No. 9163)
18 Attorney for Defendants Morrison and Jinco

19 **CERTIFICATE OF MAILING**

20 I hereby certify that on this 19th day of January, 1999, a true and correct copy of
21 the foregoing Defendants Wayne Morrison and Jinco Leasing Corporation's Response in
22 Opposition to Request for Entry of Default was deposited in the U.S. Mail first-class
postage prepaid to:

23 Timothy C. Karen
24 Law Offices of Timothy C. Karen
25 12702 Via Cortina, Suite 100
26 Del Mar, CA 92014

27 

The Law Offices of
Richard K. Rufner

January 14, 1997

Timothy C. Karen, Esq.
Law Offices of Timothy C. Karen
12702 Via Cortina, Ste. 100
Del Mar, CA 92014

RE: Bradley, et al vs. Andover Securities, et al
Case No. 96-1023-J
In the United States District Court for the Southern District of California

Dear Mr. Karen:

This letter is in follow-up to our telephone conversation last week regarding the above-referenced matter and the claims against my clients Jingo Securities, Jingo Leasing Corp. and Wayne Morrison. As I understand the Complaint, the only Plaintiff complaining against my clients is Steven H. Johnson. I have further reviewed the factual allegations against my clients as well as the investment at issue and now reiterate to you my clients' objection to any jurisdiction over my clients in the State of California. All actions complained of occurred in the State of Colorado in telephone conversations and/or mail directed between Mr. Johnson and Jingo Securities. Thus, there is no basis for personal jurisdiction in California. Furthermore, we do not believe that the class action in the United States District for the Southern District of New York would have tolled the statute of limitations against Jingo Securities and Mr. Morrison in his role as a principal of Jingo Securities, given that Jingo Securities was never named as a party to that class action suit.

For the reasons as set forth above, my client will not be responding voluntarily to the above-referenced action. Should you obtain formal service of process upon my clients, then I shall necessarily move to dismiss the action for lack of personal jurisdiction and violation of the applicable statute of limitations.

Sincerely,



RICHARD K. RUFNER

RKR:lbw

EXHIBIT A

7720 East Belleview Avenue
Suite 200
Englewood, Colorado 80111
OFFICE: (303) 796-9500
Facsimile: (303) 779-6006

COPIES TO CLIENT

3/26/98

The Law Offices of
Richard K. Rufner

March 24, 1998

Timothy C. Karen, Esq.
The Law Offices of Timothy C. Karen
12702 Via Cortina, Suite 100
Del Mar, CA 92014

Re: Clark, et al. v. Andover Securities, Inc., et al. Case No. 96-1023-J
In the United States District Court, Southern California

Dear Mr. Karen:

I am writing to you on behalf of my clients Jinco Leasing Corporation and Wayne Morrison with regard to the Summons in a Civil Action on Second Amended Complaint which my clients received by registered mail from you March 16, 1998,. A certified mailing does not, of course, constitute proper service of a summons and complaint pursuant to F.R.C.P. 4.

Last year I wrote to you regarding my questions about the manner and method of service of process of the original complaint upon my clients, and with regard to my concerns about personal jurisdiction over my clients in the State of California. To date, I have not received from you any verification of service of process on my clients. Thus, I am not clear as to why you have recently mailed to my clients a copy of the Summons in a Civil Action on Second Amended Complaint as they have never been properly joined in the action. Would you please send to me as soon as possible a copy of the return of service upon my clients so that I can verify the manner and method by which jurisdiction is being asserted? Also, please provide to me what facts and information you have which would support personal jurisdiction over my clients in the State of California.

I thank you for your cooperation and shall look forward to hearing from you.

Sincerely,


Richard K. Rufner

RKR/cdd

EXHIBIT

B